No. 80-1874

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

*Petitioner,*

—v.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

*Respondents.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF FOR THE PETITIONER


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## QUESTIONS PRESENTED

1. Whether petitioner can be required to exhaust administrative remedies despite this Court's consistent and repeated holdings that exhaustion is not required in cases under §1983, continued congressional recognition and approval of those holdings, and the absence of any historical basis to support a departure from this Court's accurate construction of §1983?

2. Whether the recent enactment of the Civil Rights of Institutionalized Persons Act in 1980, 42 U.S.C. §1997e, which explicitly authorizes required exhaustion of administrative remedies in §1983 cases but only in narrow and specified circumstances not present here, precludes judicial imposition of a different or broader exhaustion requirement in other circumstances where Congress has not seen fit to require exhaustion?

3. Whether the Fifth Circuit erred in requiring consideration of administrative

exhaustion where (a) defendants failed to demonstrate that such remedies were assured, plain, speedy, and effective, and at least as protective of petitioner's interests as the analogous procedures of 42 U.S.C. §1997e, and (b) the administrative agency to which plaintiff would be remanded ultimately was not empowered to award either injunctive relief or the damages petitioner sought?

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## OPINIONS BELOW

The opinion of the Court of Appeals en banc (Appendix to the Petition for Certiorari, hereinafter "PA," at 1a-122a) is reported at 634 F.2d 900. The vacated opinion of the Fifth Circuit panel (PA 123a-126a) is reported at 612 F.2d 946. The summary order of the district court dismissing the complaint for failure to exhaust administrative remedies (PA 127a-128a) is not reported.

## JURISDICTION

The judgment of the Court of Appeals en banc (PA 129a-131a) was entered on January 22, 1981. The petition for a writ of certiorari was filed on May 7, 1981, the time for filing having been extended on April 3 to May 7, 1981 by Justice Powell, and was granted on October 5, 1981. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

## STATUTES INVOLVED

Section 1983 of Title 42 of the United States Code, reproduced in the Petition for Certiorari at 2.

The Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980), section 7, codified at 42 U.S.C. §1997e (Supp. 1981), reproduced at PA 132a.

## STATEMENT OF THE CASE

1. On February 7, 1979, Georgia Patsy filed a complaint in the United States District Court for the Southern District of Florida, alleging that the defendant state university, her employer, had solely because of her race (Caucasian) and sex unlawfully denied her employment opportunities for which she was well qualified. Joint Appendix ("JA") 29.[1/] In plaintiff's amended complaint (which must be assumed to be true for present purposes), she alleged that despite

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1/ All references are to the amended complaint, filed on April 19, 1979.

her qualifications -- a Bachelor's degree from the University of Miami, a Masters degree from Florida International University (her employer), and continuing teaching experience in the Dade County, Florida adult education program -- and despite the uniformly excellent evaluation of her work by supervisors and the former President of FIU, she had been rejected for more than thirteen named positions for which she had applied and was well qualified during her six years of employment at FIU. JA 31-33. Plaintiff alleged that the University had unlawfully filled positions through intentional discrimination on the basis of race and sex, despite the acknowledgement as early as 1972 by FIU President Charles E. Perry that plaintiff was employed in a position inferior to that which her qualifications merited. JA 32-35.[2/] Injunctive relief and damages were

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2/ Plaintiff appended to the complaint a variety
(footnote continued on following page)

sought pursuant to 42 U.S.C. §1983.[3/] JA 38-39.

The Board of Regents moved to dismiss the complaint because, inter alia, plaintiff had failed to exhaust available administrative remedies. JA 58, 65. Plaintiff opposed the motion, relying on this Court's consistent holdings that administrative exhaustion is not required. JA 86. The district court on July 9, 1979 summarily granted the motion to dismiss for failure to exhaust administrative

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(footnote continued from preceding page)
of exhibits consisting of the letter from former FIU President Charles E. Perry acknowledging that her "background qualifies her for a higher position;" faculty attestations to her "outstanding" contributions and competence; highly laudatory performance appraisals since 1973; and evidence of employment discrimination at FIU. JA 41-57.

3/ The complaint sought promotion to the next available position consistent with those plaintiff had previously applied for and for which she was qualified, or in the alternative actual and exemplary damages (JA 39). Of course, Fed.R.Civ.P. 54(c) makes plain her entitlement to seek injunctive relief and damages if she is otherwise entitled to such relief. See generally 6 J. Moore Federal Practice, ¶54.60, at 1212, and ¶ 54.62 at 1264, 1268-69 71 (2d ed. 1981). See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 409, 423-25 (1975).

remedies. PA 127a.[4/]

2. On appeal, the Fifth Circuit (Godbold, J.) reversed, finding an exhaustion requirement barred by this Court's cases, and remanded for further proceedings, including consideration of the Board's additional arguments that it was not a "person" under §1983 and that the action was barred by the Eleventh Amendment. PA 126a.

3. The Fifth Circuit granted the Board's motion for rehearing en banc, and nearly a year later reversed the panel by a vote of 17-7 and upheld the district court's

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4/ Although the record before the district court contained only a conclusory allegation in the complaint that "plaintiff has no plain nor adequate remedy at law to redress the wrongs" complained of (JA 37), defendant's attorneys knew, and the Fifth Circuit was later advised, that plaintiff's attorneys had met unsuccessfully in September, 1978 for an hour with the acting President of FIU and FIU's attorney concerning plaintiff's employment situation "with a view toward resolving the problem without having to resort to the Courts for relief." C.A. Reply Brief of Appellant 1 (Nov. 30, 1979). The participants at that meeting were FIU attorney Bill Glenn, FIU Acting President Dr. Joseph Olander and Georgia Patsy's attorneys, Denis Dean and now-United States District Judge Eugene P. Spellman.

conclusion that §1983 plaintiffs are required to exhaust administrative remedies. PA 1a-120a.

Writing for the majority, Judge Roney dismissed as dicta this Court's repeated statements that §1983 plaintiffs need not exhaust administrative remedies. Judge Roney canvassed the policy reasons in favor of and against an exhaustion requirement (PA 37a-48a), and concluded, largely for reasons of efficiency and comity, that exhaustion would henceforth be required in all §1983 cases under the general standards set forth in McKart v. United States, 395 U.S. 185 (1969) (PA 49a-52a). The majority only cursorily addressed the question whether the 42nd Congress intended to require exhaustion when it enacted what is now §1983 (PA 38a-40a), and failed to inquire whether recent congressional enactment of a limited and carefully tailored exhaustion requirement for a specific category of §1983 cases, §7 of the Civil Rights of

Institutionalized Persons Act (of which the court was apparently unaware), was inconsistent with judicial imposition of a different and far broader exhaustion requirement. Finding the record inadequate to determine "whether state administrative remedies were adequate in the context of the rights asserted by plaintiff" (PA 55a), the majority remanded for such a determination and for dismissal without prejudice if the district court found that plaintiff had bypassed adequate remedies. Id.

Seven judges joined in three dissenting opinions. Judge Rubin found Wilwording v. Swenson, 404 U.S. 249 (1971), an insurmountable obstacle to an exhaustion requirement. PA 57a-69a.[5/] He distinguished the federal administrative remedies relied on as a model by the majority from the myriad state procedures for which exhaustion would now be

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5/ Judge Kravitch also made this point in a brief dissent. PA 69a.

required, noting that "the Congress that enacted §1983 did not have the faith in state administrative remedies that later Congresses understandably had in the federal administrative remedies of their own creation." PA 65a-66a.

Judge Hatchett found that §1983 left to plaintiffs the decision whether the state or federal remedy would best enforce the rights at stake. Congress, he found, had never intended to require exhaustion. He emphasized the "time-consuming procedural nightmare" the majority opinion created, the inadequacy of the typical state administrative process for awarding attorney's fees and maintaining class actions, and the specific inadequacies of the procedure available to petitioner in this case. PA 110a-115a.

## SUMMARY OF ARGUMENT

IA. This Court has consistently held and frequently reaffirmed that exhaustion of

administrative remedies is not generally required in §1983 cases. Carter v. Stanton, 405 U.S. 669 (1972); Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963). Affirmance of the decision below would require direct overruling of these clear, consistent precedents. None of the criteria this Court has previously used to justify direct overruling of precedent applies to this case.

IB. The text and legislative history of §1983 also bar an administrative exhaustion requirement. Contemporaneous legislative history provides no evidence that Congress intended to require exhaustion, and demonstrates that an exhaustion requirement would have been inconsistent with congressional intent to provide a prompt federal judicial forum for fact-finding and adjudication of claims authorized by §1983.

IC. Congressional action subsequent to 1871 demonstrates a consistent understanding that §1983 contains no exhaustion requirement. Congress has acted consistently to require exhaustion by statute when it has intended that result. The Court should not require exhaustion unless it finds that Congress clearly intended to do so, a finding which for reasons set forth in Points I and II cannot be made here. Amendment in 1979 of §1983 to include the District of Columbia within its reach, without any criticism of this Court's consistent non-exhaustion construction of §1983, confirms Congress' approval of the non-exhaustion rule. United States v. Rutherford, 442 U.S. 544 (1979).

II. When it enacted a specific exhaustion requirement in the Civil Rights for Institutionalized Persons Act in 1980, Congress made clear that it was carving out a narrow exception to a general rule that §1983 plaintiffs could not be required to exhaust state

or local administrative remedies. After careful study of the impact of §1983 filings on federal courts, the effects of the non-exhaustion rule on the remedial goals which §1983 was intended to serve, and various countervailing interests, Congress acted to authorize exhaustion only in narrow and specified circumstances not present here. Judicial imposition of a different or broader exhaustion requirement is therefore inconsistent with clear congressional intent and recent congressional action. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Northwest Airlines, Inc. v. Transport Workers, 67 L.Ed.2d 750 (1981).

III. The decision to impose an exhaustion requirement and its design and scope implicate critical policy questions "for legislative judgment, not judicial inference." United States v. Rutherford, 442 U.S. at 559; Diamond v. Chakrabarty, 447 U.S. 303 (1980). Moreover, the exhaustion requirement recently

imposed for certain §1983 cases brought by prisoners demonstrates that were Congress to require exhaustion for other §1983 claims and plaintiffs, it would likely impose an exhaustion requirement much more limited in extent and scope than the general standard imposed by the Fifth Circuit. The Fifth Circuit's approach, in the context of thousands of differing state and local administrative agencies, will lead to burdensome litigation over collateral issues.

IV. Finally, the administrative procedures available graphically illustrate why Congress has not required exhaustion in §1983 cases generally. Those procedures are inadequate under the standards this Court has articulated. The administrative process culminates with an administrative body which lacks the authority to enforce its own rulings or grant relief without recourse to state court, and is thus inadequate under McNeese v. Board of Education. In addition, the administrative

process is procedurally and remedially inadequate, slow, confusing, and in this case futile, and therefore need not have been pursued in any event.

## ARGUMENT

### I. THIS COURT'S CONSISTENT DECISIONS, AND LEGISLATIVE HISTORY FROM 1871 TO THE PRESENT, CONFIRM THAT SECTION 1983 PLAINTIFFS ARE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES

This Court has repeatedly held that exhaustion of administrative remedies by federal plaintiffs in §1983 cases is not required.[6/] A pattern of statutory construction so frequently and consistently reaffirmed and reapplied by this Court and accepted by the Congress may not be judicially overturned absent narrow circumstances not present here. Maine v. Thiboutot, 448 U.S. 1, 8 (1979); Monroe v. Pape, 367 U.S. 167, 185 (1961); Runyon v. McCrary, 427 U.S. 160, 173-75 (1976). Nor is any basis for affirmance of the decision below to be found in the text or legislative history of the Civil Rights Act of 1871, which to the

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6/ For convenience, "exhaustion" will hereafter be used to refer to required exhaustion of state administrative remedies under §1983.

contrary strongly support the non-exhaustion rule. Congressional actions subsequent to this Court's non-exhaustion holding in McNeese v. Board of Education, 373 U.S. 668 (1963) demonstrate that Congress approves of the rule and has not questioned or challenged it.[7/]

A. This Court's Consistent Decisions Bar An Exhaustion Requirement

1. The dismissal below directly contradicts consistent Supreme Court decisions

The en banc majority's conclusion that the rule against administrative exhaustion has not been settled by this Court is plainly wrong. Five of this Court's §1983 decisions have squarely announced and relied

7/ Under existing law a plaintiff under certain circumstances might be required to allege the inadequacy of state remedies as an element of his claim of a deprivation of the procedural protections of due process of law. See, e.g., Parratt v. Taylor, U.S., 68 L.Ed. 2d 420 (1981). The application or scope of that principle is not at issue in this case.

on the rule.[8/] These holdings have repeatedly been approved in this Court's *dicta* as well.[9/] Each member of this Court

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8/ Carter v. Stanton, 405 U.S. 669, 671 (1972) (unanimous holding that exhaustion of state administrative remedies not required in challenge to denial of welfare benefits on statutory and constitutional grounds); Wilwording v. Swenson, 404 U.S. 249, 251 (1971)(8-1 holding that exhaustion of state administrative remedies not required in prisoners' challenge to conditions of confinement, whether or not exhaustion would be futile); Houghton v. Shafer, 392 U.S. 639, 640 (1968)(unanimous holding that exhaustion of state administrative remedies not required in prisoners' challenge to seizure of legal materials by prison authorities, whether or not exhaustion would be futile); Damico v. California, 389 U.S. 416, 417 (1967)(8-1 holding that exhaustion of federally-imposed state administrative remedies not required in constitutional challenge to denial of welfare benefits); McNeese v. Board of Education, 373 U.S. 668 (1963)(8-1 holding that exhaustion of state administrative remedies not required in school desegregation case, whether or not exhaustion would be futile).

9/ FAIR v. McNary, No. 80-427 (Dec. 1, 1981) Slip. op. at 3-5; Allen v. McCurry, 449 U.S. 90, 104 n.24 (1981)("federal habeas corpus is bounded by a requirement of exhaustion of state remedies ... which have no counterparts in §1983"); Ellis v. Dyson, 421 U.S. 426, 432-33 (1975)("Exhaustion of state judicial or administrative remedies in Steffel was ruled not to be necessary, for we have long held that an action under §1983 is free of that requirement") Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on

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has agreed that the Court's decisions have firmly established the rule.[10/] Far from being reached in "an almost off the cuff manner",[11/] those holdings were the product

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42 U.S.C. §1983 ... we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights"); Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974); Allee v. Medrano, 416 U.S. 802, 814 (1974); Preiser v. Rodriguez, 411 U.S. 475, 492-93 n.10, 494 (1973)("Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustin of state remedies.") See also Burrell v. McCray, 432 U.S. 471 (1976)(White, J., dissenting and Stevens, J., concurring).

10/ See, e.g., FAIR v. McNary, slip op. at 4; id. at 20 (concurring opinion); Allen v. McCurry, 449 U.S. at 104 n.24 (1981); Parratt v. Taylor, U.S., , (1981), 68 L.Ed.2d 420, 440 n.13 (Powell, J., concurring in the result); Burrell v. McCray, 426 U.S. 471 (1976)(White, J., dissenting); id., (Stevens, J., concurring).

11/ City of Columbus v. Leonard, 443 U.S. 905 (1979)(Rehnquist, J., dissenting).

of reasoned decisions, after consideration of historical materials and policy arguments.[12] They were tested against careful but ultimately unpersuasive dissents,[13] which urged the very arguments made by the court below and the Board here.[14]

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12/ See, e.g., Brief for the ACLU in McNeese v. Board of Education, supra; Brief for the Appellee in Damico v. California, supra; and the two Briefs for the Appellees in Carter v. Stanton, supra. The Carter briefs rely heavily on Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969)(Friendly, J.)(urging exhaustion in §1983 cases). After oral argument in Carter on November 8, 1971, and while that case was under consideration, this Court was carefully considering Eisen. See Lynch v. Household Finance, 405 U.S. 538, 542 (1972).

13/ See, e.g., McNeese v. Board of Education, 373 U.S. 668, 676 (Harlan, J.)(exhaustion of administrative remedies); Damico v. California, 389 U.S. 416, 417 (exhaustion of federally-mandated remedies). See also Eisen v. Eastman, supra n.12.

14/ Although the court of appeals attempted to demonstrate that the repeated refusals to require exhaustion were dicta because exhaustion might have been futile, this Court rested its decisions squarely on holdings that exhaustion was not required, as the separate dissenting opinions of Judges Rubin and Hatchett demonstrate. PA 57a-62a, 71a-102a. At the least, the general rule against required exhaustion was an independent ground of the decisions and as such cannot be disregarded as dicta. See United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924); see also Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949).

In contrast to this extensive line of cases, the Fifth Circuit relied solely on Gibson v. Berryhill, 411 U.S. 564 (1973) and its descendent, Barry v. Barchi, 443 U.S. 55 (1979). That reliance is misplaced. Gibson's suggestion that an exception to the non-exhaustion rule might exist where

> a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding

does not apply to this case. 411 U.S. at 574-75. No proceedings of any sort have been "brought by the state" or are "pending in one of its own agencies". Petitioner is complaining of harm already suffered, not harm yet to occur.[15/] In any event,

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15/ The question reserved in Gibson v. Berryhill may be before the Court this term in Middlesex County Ethics Committee v. Garden State Bar Association, No. 81-460, cert. granted, 50 U.S.L.W. 3333 (Nov. 2, 1981).

of course, the general rule barring exhaustion was restated after Gibson in FAIR v. McNary, Allen v. McCurry, Ellis v. Dyson, Wolff v. McDonnell, and Steffel v. Thompson.

Just last Term, this Court relied on the non-exhaustion rule in Board of Regents v. Tomanio, 446 U.S. 478 (1980). There, the Court held that New York could refuse to toll a statute of limitations pending exhaustion even though individuals who had chosen to rely on state remedies might still be involved in the administrative process by the end of the statute of limitations period, and would consequently be compelled to file a protective lawsuit to preserve a §1983 action. The Court reasoned that a federal rule tolling state limitations rules pending exhaustion was appropriate only where Congress has required "previous resort to state proceedings," 446 U.S. at 490, not where Congress has created an

action "separate and independent" from "other available" state remedies, as in §1983. 446 U.S. at 491. Tomanio itself concerned judicial exhaustion, but the Court's reasoning necessarily applies with equal force to the question of administrative exhaustion.

In light of the Court's consistent adherence to the non-exhaustion rule, and its reliance on the rule to answer other questions under §1983, affirmance of the decision below would require a departure from stare decisis which is unwarranted under the governing factors.

2. This case presents no justification for abandoning the settled non-exhaustion rule

The doctrine of stare decisis reflects the Court's reluctance to overrule its prior holdings even though other rulings might currently seem more attractive. Runyon v. McCrary, 427 U.S. at 174-75 & n.12; Monell v. Department of Social Services,

436 U.S. 658, 695-701 (1978); Monroe v. Pape, 365 U.S. at 192 (Harlan, J., concurring). The doctrine applies with special force in cases of statutory construction, because Congress may at any time correct perceived judicial misinterpretations. Illinois Brick Co. v. Illinois, 431 U.S. 720, 736-37 (1977); Edelman v. Jordan, 415 U.S. 658, 695-701 (1974); Monroe v. Pape, 365 U.S. at 185. The Court has never settled on a definitive formula for determining when a holding may be overruled, but Monell identified four factors to be considered: (1) whether overruling would contradict congressional intent; (2) whether the prior holdings in question were themselves a departure from previous decisions; (3) whether overruling would frustrate legitimate reliance placed on the prior holdings; and (4) whether the prior holdings had misconstrued the statute's meaning. 436

U.S. at 696-701.[16/] None of these factors justifies overruling the frequently reaffirmed non-exhaustion rule.

First, even if the enactment of the Civil Rights of Institutionalized Persons Act were not dispositive of this case, the limited exhaustion requirement adopted and the legislative history demonstrate conclusively that Congress knew of and agreed with the general non-exhaustion rule and was unwilling to go beyond a narrow exception to the rule created to govern prisoner claims. See generally infra Point II.[17/]

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16/ With respect to the last factor, the Monell Court did not decide whether the prior holdings had to appear wrong "beyond doubt," as advocated by Justice Harlan in Monroe v. Pape and by Justice Rehnquist dissenting in Monell, but found that test to have been satisfied in any event. 436 U.S. at 700-01.

17/ See also, e.g., 124 Cong. Rec. H. 7481 (daily ed. July 28, 1978)(remarks of Rep. Wiggins with regard to H.R. 9400, the predecessor to Pub.L. No. 96-247, passed by the House in the 95th Congress): (footnote continued on following page)

Explicit congressional knowledge and approval of an unbroken twenty-year line of cases argues powerfully against now overruling them. Maine v. Thiboutot, 448 U.S. 1, 8 (1979); United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979); Runyon v. McCrary; 427 U.S. at 173-75; Monell v. Department of

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> [I]t is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action...[S]ome of us have felt that the requirement of exhaustion of remedies would be desirable in the case of §1983 actions, but for various reasons it has been impossible to implement this requirement. The bill, however, makes a modest approach at an exhaustion of remedies requirement.

Id. Rep. Ertel similarly stated:

> [U]nder 1983 a State prisoner can come directly into Federal court, file his petition with no notification to the State whatsoever, and the Federal Court must take jurisdiction.

Id. at H 4624. Assistant Attorney General Drew S. Days testified to the same effect in the House hearings. See Hearings on H.R. 4239 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee, 95th Cong., 1st and 2d Sess. 20 (1977-78). See also n.47, infra.

Social Services, 436 U.S. at 696-99; Flood v. Kuhn, 407 U.S. 258, 269-85 (1972); Laird v. Nelms, 406 U.S. 797, 802 (1972). See also Monroe v. Pape, 365 U.S. at 192 (Harlan, J., concurring). This legislative understanding and approval is of decisive importance even if this Court's earlier assessment of Congress' intent were doubtful or even erroneous, because

> the relevant inquiry is not what Congress correctly perceived as the then state of the law, but rather what its perception of the state of the law was.

Cannnon v. Univ. of Chicago, 441 U.S. 677, 711 (1979)(citation omitted). See also New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980).

Second, departure from stare decisis is unwarranted because the prior holdings at issue were not deviations from prior precedent. Before McNeese, the Court had never addressed the §1983 exhaustion ques-

tion.[18] Cf. Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 47 (1977).

Third, to overrule the Court's holdings rejecting exhaustion would frustrate the reliance placed on such holdings by plaintiffs, like petitioner, who may have selected what they believe to be the quicker, cheaper, and more effective remedy of a federal court action, in reliance on McNeese and its progeny.[19]

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18/ In a contemporaneous decision, this Court unanimously rejected an administrative exhaustion requirement urged for a statute similar in form to §1983's predecessor, reasoning that it would add "a jurisdictional requirement which Congress alone had the power to establish." Clyde v. United States, 80 U.S. (13 Wall.) 35, 39 (1871).

19/ Failure to comply with the requirements of administrative remedies fully and in a timely manner could result in waiver of those remedies, and consequent bar to suit under §1983 for failure to exhaust. See McGee v. United States, 402, US 479, (1971). Cf. Wainwright v. Sykes, 433 U.S. 72 (1977). In addition, imposing a new exhaustion requirement on litigants already in federal court could lead in many cases to substantial delay with an adverse impact on the development of records.

Fourth, stare decisis effect should be accorded the Court's prior non-exhaustion decisions because it is "not beyond doubt" that such decisions misconstrued the meaning of the statute. See supra, at n.16. Indeed, as we now show, those decisions are clearly correct.[20/]

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20/ Justice Powell, concurring in Monell, indicated that the degree to which an issue in question had been fully considered in prior cases might be another factor justifying overruling prior decisions. 436 U.S. at 709. Because the non-exhaustion holdings constitute a clear and uncontradicted line of precedent that was decided with full recognition of their implications, this factor also supports full application of stare decisis here. See supra, nn.12, 13.

B. The Text and Legislative History of Section 1983 Bar an Exhaustion Requirement

The Reconstruction civil rights statutes must be given the meaning dictated by their "origins and their language." Lynch v. Household Finance Corp., 405 U.S. 549; Maine v. Thiboutot, 448 U.S. at 14 (Powell, J., dissenting); see also Owen v. City of Independence, 445 U.S. 622, 635-37 (1980). The historical context in which §1983 was enacted confirms what the expansive sweep of the statutory language clearly commands: courts cannot interject exhaustion to delay or deny the independent right of action in federal court that Congress gave plaintiffs under §1983.[21/]

1. The text of section 1983 bars administrative exhaustion

It is not necessary to look beyond the words of §1983 to reject a general

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21/ References will generally be to §1983 where its predecessor, §1 of the Civil Rights Act of 1871, is discussed, except where pertinent differences are noted.

exhaustion requirement. See Maine v. Thiboutot, 448 U.S. at 6 n.4. The plain language of the statute, supported by consistent judicial interpretation, makes such a requirement impermissible:

> By the plain terms of §1983, two -- and only two -- allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Gomez v. Toledo, 446 U.S. 635, 640 (1980) (emphasis added). Compare Clyde v. United States, discussed supra, at n.18. Had Congress intended an exhaustion requirement as an additional condition for seeking §1983 relief, it would have so specified either then or subsequently, as Congress frequently has done in other civil rights

legislation.[22/]

2. Required administrative exhaustion would contradict Congress' intent in enacting section 1983

There is no evidence that the framers and supporters of the Civil Rights Act of 1871 intended to require exhaustion prior to a plaintiff's access to federal court to enforce a federal constitutional right. The very notion is anachronistic. Administrative agencies as we know them were an extremely recent innovation on the federal level -- the Department of Justice had just been organized in 1870, for example -- and virtually unknown in state government. Contemporaneous judicial precedent underscores the rejection of exhaustion as a

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22/ See infra, Point IC. In Preiser v. Rodriguez, the Court justified its prior refusal to require exhaustion of administrative remedies under §1983 on the ground that "in those cases brought pursuant to §1983, no other, more specific federal statute was involved that might have reflected a different congressional intent." 411 U.S. at 492 n.10. See also FAIR v. McNary, supra.

jurisdictional prerequisite, Clyde v. U.S., supra,[23] as well as the specific refusal to require exhaustion of state judicial remedies. Stanton v. Embrey, 93 U.S. 548, 554 (1877). See also Tennessee v. Davis, 100 U.S. 257, 266 (1880); Smyth v. Ames, 169 U.S. 466, 516-18 (1898); Ex Parte Young, 209 U.S. 123, 165-67 (1908).

Even if Congress had been aware of a judicially-imposed exhaustion principle, its application to §1983 cases would have been inconsistent with congressional intent to provide concurrent (not consecutive) federal and state jurisdiction over a substantial range of conduct.[24] The 42nd Congress

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23/ See n.18 supra.

24/ See, e.g., Congressional Globe, 42nd Cong., 1st Sess. (hereafter "Globe") 464 (Rep. Coburn); id. at 393 (Rep. Smith); id. at 691-92, 695 (Sen. Edmonds); Congressional Globe Appendix, 42nd Congress, 1st Sess. (hereafter "App.") 85 (Rep. Bingham). As these leading legislators emphasized, conduct which might constitute crimes or torts at state law might also violate the conspiracy provision of the 1871 Act, now 42 U.S.C. §1985(3). See, e.g., (footnote continued on following page)

clearly stated its intention to provide a prompt civil remedy in federal court to guarantee the enforcement of constitutional rights.[25/] Opponents decried the Act's

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(footnote continued from preceding page) Griffin v. Breckenridge, 403 U.S. 88 (1971); cf. United States v. Price, 383 U.S. 787 (1966)(1870 Act). It has not been seriously argued, however, that the remedies provided in §3 of the 1871 Act or its related criminal conspiracy counterparts are inoperative prior to exhaustion of state remedies.

25/ See, e.g., App. at 85 (Rep. Bingham)("Admitting that the States have concurrent power to enforce the Constitution within their respective limits, must we wait for their action? Are not laws preventive, as well as remedial....?"); Globe at 653 (Rep. Osborn)"[W]here is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts"); id. at 367-68 (Rep. Sheldon) ("It seems to me to be sufficient and at the same time proper to make a permanent law affording to every citizen a remedy in the United States courts for injuries to him in those rights declared and guaranteed by the Constitution..."); id. at 376 (Rep. Lowe)("[T]his bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired); id. at 389 (Rep. Elliott)("[H]as the Government of the United States the right, under the Constitution, to protect a citizen of the United States in the exercise of his vested rights ... [by] the assertion of immediate jurisdiction through its courts, without the appeal or agency of the State in which the citizen is domiciled?"). See also id. at 476 (Rep. Dawes); id. at 579 (Sen. Willson); id. at 691, 695 (Rep. Edmunds).

expansion of federal judicial power to enforce constitutional rights and what they perceived as the elimination of states' rights in a statute which "takes the whole question away from [the states] in the beginning."[26/] As this Court emphasized after studying the pertinent history, "[T]he very purpose of section 1983

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26/ App. 86 (Rep. Storm). See also Globe 337 (Rep. Whitthorne)(complaining of "the destruction of local and convenient tribunals ... States and Commonwealths are to be destroyed for mere local disturbances or occasional personal trespasses upon the complaint of a single individual); App. 231 (Sen. Blair)("[I]t is contended that [the national government] can carry it out [i.e., enforcement of the Constitution] by its own officers and by supercedirg State officials"); App. 49-50 (Rep. Kerr)("a covert attempt to transfer another large portion of jurisdiction from State tribunals ... to those of the United States"); Globe 365 (Rep. Arthur)("it reaches out and draws within the circle of central power all the domestic, internal and local institutions ... and then asserts over them ... paramount control ... swallowing up the States and their institutions, tribunals, and functions ..."); Globe 361 (Rep. Swan)("the first section of this law ignores the State tribunals as unworthy to be trusted". See also App. 216 (Sen. Thurman); id. at 243 (Sen. Bayard); Globe 352 (Rep. Beck).

was to interpose the federal courts between the States and the people, as the guardians of the people's rights." Mitchum v. Foster, 407 U.S. 225, 239, 242 (1972). The Civil Rights Act of the post-Civil War era constituted "a vast transformation" in federalism, authorizing federal court intervention to protect citizens from unconstitutional action under color of state law.[27/]

The independence from state proceedings that Congress intended for §1983 is made clear from the remedial model Congress expressly relied on. With bitter irony, proponents of the Act patterned the expanded scope of jurisdiction on the 1793 and 1850

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27/ See also Zwickler v. Koota, 389 U.S. 241, 247 (1967)(federal courts became "the primary and powerful reliances for vindicating every right given by the Constitution ... ," quoting Frankfurter and Landis, The Business of the Supreme Court: A Study In The Federal Judicial System 65)(emphasis in original). See generally H. Hyman, A More Perfect Union 245-81 (1973); S. Cutler, Judicial Power and Reconstruction Politics 114-60 (1968).

Fugitive Slave Acts and on the broad nationalism invoked by Justice Story in his Constitutional law treatise and in his decision in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), which had ousted the states from any role in guaranteeing personal liberty against the federal command to return fugitive slaves.[28/] Aware of their paradoxical reliance on Prigg, the proponents nevertheless expressly settled on the federal courts as their chosen weapon to provide realistic remedies for constitutional violations, against the arguments of opponents who helplessly criticized a revolution which, in their view, abandoned states' rights for centralized government.[29/]

28/ See, e.g., App. 69-71 (Rep. Shellabarger); id. at 85 (Rep. Bingham); Globe 375 (Rep. Lowe).

29/ The House sponsor of the 1871 Act, Rep. Shellabarger, described it as part of "this transcendent profusion of enactment in restraint of the

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The intention of the 42nd Congress to provide "a federal tribunal for fact findings" in §1983 cases has been apparent even to those who have taken the narrowest view of §1983. See, e.g., Monroe v. Pape, 365 U.S. at 247-48, 251-52 (Frankfurter, J., dissenting).30/ In 1871 and for long

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States and affirmative conferment of power on Congress." App. 69. The Speaker of the House, James G. Blaine, summarized the mood of Congress as one in which "everything which may be done by either nation or states may be better and more securely done by the nation." II Twenty Years of Congress 160 (1886). The debates indicate congressional intention to pass a "permanent" law, dealing not only with the present situation in the South but with violations of rights in the North, and the future. See, e.g., Globe 368 (Rep. Sheldon); App. 69-71 (Rep. Shellabarger); Globe 476 (Rep. Dawes); Globe 701 (Sen. Edmunds); App. 85 (Rep. Bingham). See generally Gillette, Retreat from Reconstruction (1979)(Republican hopes that the Act could be used, inter alia, against the Tweed Ring in New York).

30/ Justice Frankfurter criticized "the theory that the Reconstruction Congress could not have meant §1979 principally as a 'jursidictional' provision granting access to an original federal forum in lieu of the slower, more costly, more hazardous route of federal appeal from fact-finding state courts, [because it] forgets how important providing a federal trial court was among the several purposes of the Ku Klux Klan Act." 365 U.S. at 251 (emphasis added, citation omitted). See also Lane v. Wilson, 307 U.S. 268, 274-75 (1939).

afterward, special emphasis was placed on the importance of federal court fact finding in constitutional adjudication. That emphasis, of course, is inconsistent with leaving §1983 cases to administrative tribunals, which in other contexts are relied on precisely for their superior fact-finding expertise.[31/] Nor can it be argued that the

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31/ Justice Holmes, who had written essays supporting the Ku Klux Klan Act while a teacher at Harvard College in 1871, held in this Court's first administrative exhaustion case that administrative procedures could be required at the "legislative" stage when policy was neither set nor effectuated, Prentis v. Atlantic Coastline Co., 211 U.S. 210, 224-28 (1908), but not to delay constitutional challenges where policy was set and harm had occurred. Resort to genuine state "remedies" could not be required because "[a]ll their constitutional rights ... depend upon what the facts are found to be." Therefore plaintiffs could not "be forbidden to try those facts before a court of their own choosing ...." Id. at 228. See also Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 293 (1923)(Holmes, J.)("Rules of comity and convenience must give way to constitutional rights"); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 29-30. Allen v. McCurry is not to the contrary. Allen did not disagree that §1983 generally secured to plaintiffs a choice of fact-finding forum, but held that litigants bound by previous judgments were precluded by a 1790 statute, now

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42nd Congress provided federal courts the power to renounce, without further congressional direction, the jurisdiction provided in the Act. That suggestion is refuted by its frequent references to Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).[32/] As Congress knew from those cases, actions cognizable in federal courts could be fully tried there.[33/]

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28 U.S.C. §1738, from making use of that choice. 66 L.Ed. 2d at 314-17. Similarly, because the exhaustion doctrine developed well after 1871, Congress cannot be said to have incorporated into §1983 a common law exhaustion principle. Cf. Owen v. City of Independence, 445 U.S. at 637.

32/ "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). See, e.g., Globe 459 (Rep. Coburn); Globe 476 (Rep. Dawes); Globe 691-92 (Rep. Edmunds).

33/ Of course, Congress might direct prior recourse to state remedies for a particular category of cases. E.g., FAIR v. McNary. Without substantial legislative direction to that effect, however, §1983 does not require it.

The 42nd Congress had three main purposes for §1983: compensation, deterrence, and emphasizing the importance that Constitutional rights have in our society. See, e.g., Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); Owen v. City of Independence, supra, 445 U.S. at 651; Carey v. Piphus, 435 U.S. 247, 266 (1978). In 1871 and still today those goals were uniquely characteristic of the judicial remedy in our jurisprudence. See Carlson v. Green, 446 U.S. 14 (1980). Available evidence uniformly suggests that in 1871 Congress intended to rely solely on courts for their implementation.

C. Recent Congressional Activity Demonstrates Consistent Understanding That Section 1983 Bars A Judicially-Imposed Exhaustion Requirement

The conclusion that exhaustion is not generally required in §1983 cases, based on this Court's consistent decisions and the text and legislative history of §1983, is confirmed by additional actions Congress has taken since Monroe v. Pape and McNeese v. Board of Education.

First, because Congress has so consistently and expressly exercised its power to prescribe the basic procedural scheme under which claims may be heard and to correct judicial imposition of exhaustion requirements by enacting statutory exhaustion requirements differing substantially from judge-made requirements, the Court should not imply an exhaustion requirement unless it finds that Congress intended to require one. See Transamerica Mortgage

Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979); Touche Ross & Co. v. Redington, 442 U.S. at 568; Cannon v. University of Chicago, 441 U.S. 677, 717 (1979)(Rehnquist, J., concurring); id. at 730 (Powell, J. dissenting). As shown in Point IB, the 42nd Congress cannot even conceivably be thought to have done so. To be sure, courts play a role in determining the parameters of exhaustion,[34/] but the initial question whether claims under a particular provision of law are generally subject to an exhaustion requirement at all is nearly uniformly answered by reference to statutory provisions or clear inferences therefrom.[35/]

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34/ See, e.g., McKart v. United States, 395 U.S. 185 (1969); McGee v. United States, 402 U.S. 479 (1971); and Weinberger v. Salfi, 422 U.S. 749 (1975). See also n. 53 infra.

35/ Congress has specifically provided detailed schemes for exhaustion in numerous statutes. See, e.g., 7 U.S.C. §136d(4) (Federal Insecticide, Fungicide and Rodenticide Act); 7 U.S.C. §2023 (Food

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Second, the decision to make modern civil rights remedies independent of pre-existing remedies under the Reconstruction civil rights statutes reiterates and confirms congressional understanding that exhaustion was not required under those statutes.

The right of equal employment opportunity created by Title VII of the Civil Rights Act of 1964 was deliberately kept independent of the "avenues of relief" previously open and still available under post-Civil War statutes, Johnson v. Railway

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Stamp Program); 29 U.S.C. §817 (CETA); 33 U.S.C. §1369(b)(2)(Federal Water Pollution Control Act). Exhaustion for other claims under federal statutes which lack detailed exhaustion requirements is statutorily required under the Administrative Procedures Act, 5 U.S.C. §704. Congress consistently responded to judicial imposition of exhaustion by reasserting its legislative function, specifying exhaustion where and as Congress seeks to require it, substituting its own quite different views for those taken earlier by courts. See, e.g., Rosewell v. LaSalle National Bank, U.S. (1981), 67 L.Ed. 2d 464, (construing Tax Injunction Act, 28 U.S.C. §1341). Compare Ex Parte Royall, 112 U.S. 181 (1884) with 28 U.S.C. §2254(d).

Express Agency, 421 U.S. 454, 460 (1975), or otherwise, Alexander v. Gardner Denver Co., 415 U.S. 36, 47-49 (1974); Electrical Workers v. Robins & Myers, Inc., 429 U.S. 229 236-240 (1976). Although formally reserving the exhaustion question, 421 U.S. at 456 n.3, the Court's refusal in Johnson to toll the statute of limitations for §1981 claims pending exhaustion before the EEOC indicates that the policies favoring sub-judicial resolution of Reconstruction-era civil rights claims were out-weighed by the independence Congress sought for such claims from "elaborate and time-consuming procedures." Id. at 466.[36/] Congressional

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36/ Johnson's description of Title VII's procedures as "elaborate and time consuming" in comparison with the older remedy is highly significant in light of the fact that Title VII grants plaintiffs an absolute right to sue in federal court after 180 days. 42 U.S.C. §2000e-5(f). At the least, that time limit indicates congressional disapproval of any longer exhaustion requirement for cases of employment discrimination.

rejection in 1972 of Senator Hruska's proposal to make Title VII an exclusive judicial remedy, at the same time Congress extended Title VII to state and local employees, further confirms congressional understanding and approval of the functional independence of the post-Civil War remedies from Title VII and its administrative remedies.37/

Third, when Congress amended §1983 for the first time in a century in 1979 to add the District of Columbia to its coverage,38/ no complaint was heard concerning this Court's consistent and well-known holdings that administrative exhaustion could not be

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37/ See 118 Cong.Rec. 3371 (Sen. Williams); id. at 3370 (Sen. Javits). See also Alexander v. Gardner-Denver, 415 U.S. at 48 n.9. Courts have agreed that state and local employees may seek remedies for employment discrimination under both Title VII and §1983. See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 309 n.15; Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1979). Compare Brown v. GSA, 425 U.S. 820 (1976)(federal employees).

38/ P.L. 96-170. 93 Stat. 1284.

required.[39] Once a judicial or administrative interpretation has been

> "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.

United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979), quoting from Apex Hosiery Co. v. Leader, 310 U.S. 469, 487-89 (1940).

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39/ Congress' silence concerning the non-exhaustion rule is particularly significant here since the sole purpose of the amendment was to correct another of this Court's constructions of §1983, District of Columbia v. Carter, 409 U.S. 418 (1973), with which Congress did disagree. Opposition to the restrictive interpretation in that case, coupled with lack of any opposition to the broadly remedial interpretation in Monroe and McNeese, plainly gauges the intent of Congress. Indeed, the House Report stressed that the very purpose of §1983 was to "provid[e] a neutral Federal forum" for civil rights complaints. H.Rep. 96-548, 96th Cong., 1st Sess. (1979). See 125 Cong. Rec. at H 11175-77 (Nov. 27, 1979) and S 19100 (Dec. 18, 1979).

40/ See also Lorilland v. Pons, 434 U.S. 575, 580-81 (1978); United States v. Board of Commissioners of Sheffield County, 435 U.S. 110, 134-35 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975)

Although these expressions of congressional support establish the non-exhaustion rule's consistency with congressional intent beyond challenge,[41/] any remaining doubt has been laid to rest by recent legislation demonstrating firm congressional understanding and approval of the general rule, to which we now turn.

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41/ Congress also demonstrated its intention that exhaustion of administrative remdies not be generally required in 1978, when it allowed complainants to choose between state administrative remedies and a §1983 lawsuit to resolve complaints concerning Title I of the Elementary and Secondary Education Act. See Education Amendments of 1978, 20 U.S.C. §2738 (Supp. 1979), and S.Rep. No. 856, 95th Cong., 2d Sess. 31 (1978).

## II. THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT OF 1980, WHICH AUTHORIZES EXHAUSTION IN SECTION 1983 CASES ONLY IN NARROW AND SPECIFIED CIRCUMSTANCES CONCEDEDLY NOT PRESENT HERE, PRECLUDES JUDICIAL IMPOSITION OF A DIFFERENT OR BROADER EXHAUSTION REQUIREMENT

Congress, fully and expressly aware of the rule against exhaustion and the extent of §1983 filings by both prisoners and non-prisoners, recently enacted the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349, codified at 42 U.S.C. §1997 (Supp. 1980). The Act allows exhaustion in §1983 cases only in circumstances not present here and in no way analogous to this case.[42/] The Fifth Circuit's across-the-board exhaustion requirement is inconsistent with that Act, and improperly usurped policy judgments Congress has reserved for itself.

This Court has stressed its obligation to identify and follow congressional intent when deciding a broad range of procedural

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42/ The pertinent provision is set forth at PA 132a.

questions, including the exhaustion question, arising under §1983.[43/] It is for Congress to decide whether to commit controversies regarding violations of federally secured rights under color of state law directly to courts, or to administrative agencies initially.[44/] Even for the most persuasive policy reasons, preconditions or additions may not be imposed on remedial systems where Congress does not intend them, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524 (1978), Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975), National Railroad Passenger Corp. v. National Association of Railroad

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43/ See, e.g., McNeese v. Board of Education, supra (exhaustion); Preiser v. Rodriguez, supra (agreeing that Congress did not require exhaustion in §1983 cases generally, but finding intent to require exhaustion under 28 U.S.C. §2254); Maine v. Thiboutot, 448 U.S. at 7-8 (scope of coverage).

44/ See generally L. Jaffe Judicial Control of Administrative Action 153-55 (1965).

Passengers, 414 U.S. 453, 458 (1974); where Congress has acted so as to displace courts from further activity, Northwest Airlines, Inc. v. Transport Workers, U.S. , 67 L. Ed. 2d 750, 766-67 (1981), Arizona v. California, 373 U.S. 546, 565-66 (1963); or where Congress has carved out an exception to a general remedial rule, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 269 (1975).

The Civil Rights of Institutionalized Persons Act authorizes courts to require exhaustion of "plain, speedy, and effective remedies," but only in §1983 actions brought "by an adult convicted of a crime confined in any jail, prison, or other correctional facility" and then only under narrow, specified conditions. Courts are directed not to dismiss cases pending exhaustion but only to continue them "for a period not to exceed ninety days." 42 U.S.C. §1997e(a)(1) (emphasis added). Even that

ninety day continuance may be imposed only if certain specified conditions are met. A court must find in a particular case that continuance would be "appropriate and in the interests of justice," 42 U.S.C. §1997e(a)(1). A case may not be continued unless the Attorney General certifies, or the court determines, that the available remedies are in "substantial compliance with the minimum acceptable standards promulgated [by the Attorney General] in accordance" with the Act. 42 U.S.C. §1997e(a)(2).[45/]

This extraordinarily detailed scheme demonstrates on its face congressional displacement of courts so far as required exhaustion under §1983 is concerned. The Act is inconsistent with judicial discretion to

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45/ Congress intended "that the court give 'great weight'" to a determination by the Attorney General to deny certification, see H.Rep. No. 96-80, 96th Cong., 1st Sess.25 (1979), and paid particular attention to specifying the standards grievance procedures must meet. See 42 U.S.C. §1997e(2)(A).

require exhaustion in other circumstances or under other conditions. The exhaustion provisions of the Act make sense, and were not superfluous, only if Congress believed that exhaustion could not be required prior to its enactment, and intended judicial adherence to the rule except insofar as provided for in the Act.

Indications of congressional intention are even clearer than the general comprehensiveness of the Act.[46/] The committee reports and debates are unusually clear and demonstrate Congress' decision to reject a general exhaustion requirement. Four major themes in the legislative history show knowledge and approval of the general rule against exhaustion.

First, Congress knew that under settled

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46/ Compare Northwest Airlines, Inc. v. Transport Workers Union, supra, and Arizona v. California, supra, where the Court rested its decisions solely on the comprehensiveness of statutory provisions.

statutory construction federal courts were obliged to consider §1983 claims without requiring exhaustion, as respondents concede. See Br. in Opp. at 18. For example, Representative Butler, a member of the committee that first considered the provision, explained to the House that section 7

> provides that in certain cases a federal judge may require a State prisoner who has filed a §1983 petition to go back and exhaust his state grievance procedure ... Under existing law there is no requirement that a complainant first ask the prison system to help him. He can file his grievance directly in the federal court and his case has to be investigated by that court.

125 Cong. Rec. H3641 (daily ed. May 23, 1979) (emphasis added).47/

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47/ See also supra, at n.17; 125 Cong. Rec. H3639 (Rep. McClory); id. at H3643 (Rep. Sawyer); id. at H3648 (Rep. Gudger). Representative Railsback admitted the subcommittee's initial "reluctance to resort to this [exhaustion] mechanism . . . as a possible encroachment on civil liberties; that is
(footnote continued on following page)

Second, in the course of hearings and debates in which the competing interests of state agencies and individual claimants were extensively debated,[48] Congress considered the extent of §1983 filings and their effect on the "evergrowing" caseload of federal courts.[49] Congress chose to address the caseload problem incrementally, by channelling what it knew to be the largest single category of §1983 complaints into a particular kind of grievance procedure meeting certain demanding standards.

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(footnote continued from preceding page)
to say, in the full, unimpeded resort to 1983 . . ." Civil Rights of Institutionalized Persons: Hearings on H.R.10 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, 96th Cong., 1st Sess. 26 (1979).

48/ See, e.g., 125 Cong. Rec. 4606 (daily ed. May 6, 1980) (Sen. Weicker); id. at 4608 (Sen. Thurmond).

49/ See, e.g., 125 Cong. Rec. H3639-40 (Rep. McClory) ("The northern district [of Illinois] was the fourth highest in the Nation in the number of 1983 cases filed . . . H.R. 10 would go a long way in helping those courts with their evergrowing caseload"); 125 Cong. Rec. H3637 (Rep. Butler); See also Hearings, supra n. 47, at 3 (Rep. Kastenmeier); id. at 4 (Rep. Railsback).

Third, Congress limited its exhaustion innovation to certain claims by adult prisoners in states that voluntarily adopted prison grievance procedures either certified by the Attorney General or in "substantial" compliance with his standards.[50] Lacking such compliance, even "plain, speedy and effective remedies" could be bypassed, §1997e(a)(2), and complaints "unrelated to conditions of confinement" could not in any event be continued. Conf. Rep. No. 96-897, 96th Cong., 2nd Sess. 15 (1980). Congress clearly intended that courts could not require other categories of §1983 plaintiffs to exhaust.[51]

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50/ The Conference Report stressed "the voluntary aspect of the decision by a state or local agency to adopt a grievance procedure in substantial compliance with the model minimum standards." Conf. Rep. 96-897, 96th Cong., 2d Sess. 15 (1980). An earlier version of the bill, not adopted, would have permitted exhaustion under standards similar to those in McKart v. United States, 395 U.S. 185 (1969). See HR 5791, 95th Cong., 1st Sess. (1977).

51/ H.Rep. No. 96-80 at 23. See also Hearings,

(footnote continued on following page)

Fourth, as respondents again concede (Br. in Opp. at 15-16), exhaustion was held out as a carrot only to achieve other goals Congress thought important. See, e.g., H3637 (Rep. Drinan)(May 23, 1979). Congress sought to better prison conditions by stimulating the expansion of successful grievance mechanisms of which it had been fully informed. See H.Rep. 96-80 at 23, Conf. Rep. 96-897 at 16. Although Congress heard substantial debate concerning the states' interests in managing their own institutions, the legisla-

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supra n. 47, at 24-26. Adult prisoners were singled out because prisoner filings represented the largest and most burdensome category of §1983 complaints, since a disproportionate number were uncounselled, lengthy, handwritten, or frivolous. See, e.g., 125 Cong. Rec. H3639 (Rep. McClory). Some in Congress also thought it "fair ... that one standard be applied to penal inmates who have abused the law and ... [that another be applied to those] who have not offended society at all...."125 Cong. Rec. 4622 (May 6, 1980)(Sen. Bayh). The distinction between adult prisoners and other institutionalized persons ran through the debate and was especially relevant to the conditions under which the Attorney General would be authorized to sue state institutions on behalf of the United States. See 42 U.S.C. §1997a(a).

tive history discloses that Congress breached the previously unbroken non-exhaustion wall primarily out of desire to enhance enforcement of the civil rights of institutionalized prisoners and detainees in a particular manner, and not simply to yield primary jurisdiction over certain §1983 claims to state prisons.

These four themes from the legislative history show, to paraphrase this Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, supra, that "the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot [require exhaustion under section 1983]." 421 U.S. at 269.

In nearly every respect, Congress considered the interest in speedy access to federal courts to be far more in keeping with the original goals and continuing

importance of §1983 than the Fifth Circuit's McKart-type exhaustion rule. The Fifth Circuit requires all §1983 plaintiffs to exhaust "plain, speedy, and effective" remedies, in contrast to the congressional decision to require exhaustion of only certain convicted adult prisoners; contemplates dismissal where "plain, speedy and effective remedies" have not been exhausted, in contrast to the congressional decision prohibiting dismissal and permitting at most a ninety-day continuance; and fails to insist, as Congress has, on the quid pro quo of stringent procedural reform as the price for required exhaustion. The exhaustion requirement imposed by the Fifth Circuit, in sum, is both inconsistent with congressional intent and precluded by congressional action. Alyeska, supra; Northwest Airlines, supra; Chemeheuvi Tribe of Indians v. FPC, 420 U.S. 395, 410

(1975); Red Lion Broadcasting v. FCC, 395 U.S. 367, 380-81 (1969).[52/] This Court recently emphasized the deference owed to Congress when the judiciary is asked to alter remedial schemes carefully devised by Congress:

> We [have] a duty to "respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favor--ing one side or the other in matters of statutory construction" ...

Northwest Airlines v. Transport Workers Union, 67 L.Ed. 2d at 767 (citation omitted). The disparity between the balance Congress struck in 1980 and that struck by the Fifth Circuit demonstrates the wisdom of that approach.

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52/ This Court recently vacated another Court of Appeals decision imposing an exhaustion requirement and remanding for reconsideration in light of 42 U.S.C. §1997e. Jenkins v. Brewer, U.S., 67 L.Ed. 2d 327 (1981).

## III. CONSIDERATION OF AN ADMINISTRATIVE EXHAUSTION REQUIREMENT FOR SECTION 1983 CASES REQUIRES RESOLUTION OF POLICY QUESTIONS WHICH ARE FOR CONGRESS TO RESOLVE

Even if this Court were to depart from two decades of precedent and conclude that Congress has not foreclosed courts from requiring exhaustion, judicial imposition of such a requirement would nonetheless be inappropriate. In the context of the constitutional rights §1983 was designed to enforce, the decision to impose an exhaustion requirement and its design and scope would implicate critical questions of policy appropriately decided by Congress, not the judiciary. Moreover, only Congress, through legislation such as 42 U.S.C. §1997e, could impose an exhaustion requirement comprehensive and complete enough to avoid the uncertainties, inefficiencies, and enormous increase in litigation of collateral issues that would necessarily accompany

case-by-case judicial development of an exhaustion requirement for §1983 cases.

1. At the most general level, the policy factors bearing on whether to require exhaustion at all in the context of §1983 claims do not involve "the proper functioning of [a] particular administrative system Congress has constructed" that usually guides imposition of an exhaustion requirement. McGee v. United States, 402 U.S. 479, 483 n.6 (1971).[53/] Congress has neither designed an administrative system to remedy §1983 violations gen-

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53/ Although the McGee Court observed that it was "[un]tenable to say that the [exhaustion] doctrine is inappropriate when fashioned by judicial decision rather than specific Congressional command", 402 U.S. at 483 n.6, the Court was referring there to the scope and effect of an exhaustion requirement in Selective Service cases, not to the prior question whether to require exhaustion at all. Exhaustion in Selective Service cases is imposed by congressional command. Estep v. United States, 327 U.S. 114, 119 (1946); Falbo v. United States, 320 U.S. 549, 553-54 (1944). See 50 U.S.C. App. §460(b)(3)(Supp. 1981).

erally nor recognized or relied on existing systems in the states. To the contrary, Congress plainly thought a federal court action would provide the appropriate vehicle for enforcement of civil rights. See Point IB supra.

Because exhaustion in §1983 actions cannot be defended by recourse either to congressional intent or to inferences drawn from a congressionally-drawn administrative system, proponents of an exhaustion requirement have relied heavily on policy concerns. These, however, such as the heavy caseload of §1983 cases allegedly clogging federal courts, are insufficient and inappropriate reasons for federal courts to alter their congressionally-determined jurisdiction. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 344 (1976) (right to removal in diversity cases may not be defeated because of district

court caseload); United Steelworkers v. Bouligny, 382 U.S. 145, 150-151 (1965).[54/]

The very vigor of the policy debate, moreover, and the superior institutional competence of the legislature to pursue it, suggest the importance of congressional resolution of the policies involved.[55/]

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54/ Courts and commentators may, of course, appropriately bring such factors to the attention of Congress for its consideration. See, e.g., Parratt v. Taylor, U.S. (1981), 68 L.Ed. 2d 420, 440 n.13 (Powell, J., concurring in the result) (suggesting possible need for "revision" of §1983 filings); O'Connor, Trends in the Relationship Between the Federal and State Court Judge, 22 Wm. & M. L.Rev. 801, 810 (1981)("In view of the great caseload increase ... one would think that congressional action might be taken to limit the use of section 1983").

55/ Younger v. Harris, 401 U.S. 37 (1971) is not to the contrary. Although the Court has held that "considerations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. §1983", Board of Regents v. Tomanio, 446 U.S. at 492, citing Younger, the Younger doctrine is based on congressional policy dating back to 1793 and what the Court viewed as consistent judicial implementation of that policy. Id. at 43-44. See also FAIR v. McNary, supra. The Court has frequently read certain limitations into the expansive language (footnote continued on following page)

Even such basic questions as whether judicial or administrative procedures offer §1983 plaintiffs "the swiftest, least costly, and most reliable remedy" are vigorously argued.[56/] Serious disagreement rages over whether the specialization of federal courts in constitutional law is more important than the specialization of administrative agencies in their own narrow subject matter and idiosyncratic procedure,[57/]

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(footnote continued from preceding page)
of §1983 where they were so firmly embedded in law that Congress would have expressly negated such limitations had it wished to abolish them. See Owen v. City of Independence, 445 U.S. at 637. An exhaustion requirement, however, cannot similarly be read into §1983. See Part IB, supra.

56/ Compare the views of Judges Rubin and Hatchett, dissenting below (634 F.2d 916, 925, PA 69a, 113a) with Moore v. City of East Cleveland, 431 U.S. at 529 (Burger, C.J., dissenting).

57/ Compare Whitman, Constitutional Torts, 79 U.Mich.L.Rev. 1, 23 (1980) with the en banc decision below (634 F.2d at 911, PA 42a-46a).

and whether the symbolic and institutional function of federal courts in defining, legitimizing, and enforcing constitutional claims outweighs the educational function that would follow routing such claims through state and local agencies.[58/] Also a matter of substantial disagreement is the question whether the present "free market" system, under which litigants have the option to exhaust if it appears cheaper, more efficient, and more likely to be effective, is more likely to induce creation of adequate remedies than a McKart-type standard under which plaintiffs have

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58/ Compare Carey v. Piphus, 435 U.S. 247, 266 (1978) and Davis v. Passman, 442 U.S. 228, 241 (1979) with the en banc decision below (634 F. 2d at 911-912, PA 46a-48a). See generally, Whitman, Constitutional Torts, supra, at 23. See also Jackson v. Virginia, 443 U.S. 307, 321-324 (1979), and Rose v. Mitchell, 443 U.S. 545, 559-564 (1979)(declining to extend Stone v. Powell, 428 U.S. 465 (1976) in light of special role post-Civil War Congress conferred on federal courts for determining most consitutional claims, even where states have afforded "full and fair hearing" for such claims).

no initial choice of forum.[59/]

Each of the considerations supporting an exhaustion requirement, in sum, is subject to substantial countervailing considerations. The validity of the underlying assumptions and the potential impact of exhaustion upon diverse interests can only be determined by "the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." Diamond v. Chakrabarty, 447 U.S. 303, 316-18 (1980); see also United States v. Rutherford, 442 U.S. at 552; TVA v. Hill, 437 U.S. at 194-95; United Steelworkers v. Bouligny, 382 U.S. at 150, 153.

2. Beyond the policy issues that must

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59/ Compare HR 5791 (95th Cong., 1st Sess.) (proposal for exhaustion under McKart standard; not enacted) with HR 9400 (95th Cong., 1st Sess.) and 42 U.S.C. §1997e (continuance not to exceed ninety days for certified procedures meeting federal standards). Congressional rejection of the proposal that prisoners be required to exhaust state-designed administrative remedies free from federal standards and control indicates that Congress opposes such a system for §1983 litigants generally.

be resolved in deciding whether to require exhaustion of administrative remedies in cases brought under §1983 are equally weighty questions concerning the design and scope of an exhaustion requirement. Here too, the answers are not inferable, as they are in other contexts, from "a particular administrative system Congress has constructed." McGee v. United States, 402 U.S. at 483 n.6. Resolution of these questions requires hard policy choices; but instead of seeking congressional direction, the Fifth Circuit has set out to decide the policy questions itself, on a case-by-case basis. Moreover, only Congress has the ability to draw lines that will preclude the costly, burdensome, remedy-delaying and court-burdening litigation that incremental judicial development of exhaustion in the context of thousands of different agencies would necessarily spawn.

a. Categorization

In what categories of claims should exhaustion be required? Legislative categorization could afford reasonably bright lines that courts are generally incapable of drawing. Compare Wilwording v. Swensen, 404 U.S. at 251 ("state prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs") with 42 U.S.C. §1997e (exhaustion only for condition of confinement claims of adult convicted prisoners).

b. Multiple Jurisdictions

Enormous uncertainty and endless litigation would ensue from exhaustion without the usual centralizing and unifying interaction of a single system of courts on a single administrative agency. Claims under §1983 arise in literally thousands of state, county, and municipal jurisdictions, and in dozens of agencies in each jurisdiction.

Only Congress, through legislation such as 42 U.S.C. §1997e, could provide the necessary unifying standards which the legislative history of the Act indicates that Congress would probably insist on, assuming arguendo that Congress might eventually decide to require exhaustion in non-prison context.

c. Tolling and Duration

Because statutes of limitations governing §1983 actions are not tolled pending exhaustion, Board of Regents v. Tomanio, supra, an exhaustion requirement could lead inexorably to the effective repeal of §1983. This is plainly a matter for Congress, not this Court. Congressional activity in analogous areas suggests that Congress would avoid that result by imposing time limitations and tolling rules different than those the Fifth Circuit has pointed toward, if it required exhaustion at all. See, e.g., 42 U.S. §1997e

(continuance for ninety day maximum); 42 U.S.C. §2000e-5 (right to sue after 180 days); 20 U.S.C. §2738, discussed supra, at n.41 (immediate right to sue).

d. Collateral estoppel, and res judicata

Although the court below stated that decisions of state or local administrative agencies would not be afforded collateral estoppel effect (634 F.2d at 910, PA 41a),[60/] the recent holding that collateral estoppel applies with full force in the context of §1983[61/] and its applicability to certain federal administrative factual determinations[62/] guarantee further litigation con-

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60/ See, to that same effect, Moore v. City of East Cleveland, supra, 431 U.S. at 524 n.2 (Burger, C.J., dissenting).

61/ Allen v. McCurry, supra.

62/ See, e.g., United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966).

cerning the issue, especially if considerations of comity moved the Court to require state judicial review of state administrative action. See City of Columbus v. Leonard, supra (Rehnquist, J., dissenting). Such a requirement might well trigger both collateral estoppel and res judicata,[63/] and thereby transform §1983 into an empty shell. Congressional consideration of such consequences is plainly required, in light of the clear congressional intention that §1983 guarantee prompt access to the federal forum for §1983 cases generally. See Points I and II, supra.

e. Waiver

What consequences would attach to failure to comply with time limits and

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63/ See American Mannex v. Rozands, 462 F.2d 688 (5th Cir.), cert. denied 409 U.S. 1040 (1972); Sinocropi v. Nassau County, 601 F.2d 60 (2nd Cir. 1979); Mitchell v. National Broadcasting Co., 553 F.2d 265 (2nd Cir. 1977).

other state or local procedural prerequisites were exhaustion to be required? Presumably, negligent or even deliberate waiver would not lead to the harsh consequences of foreclosing the federal §1983 action, since Congress has neither expressly imposed exhaustion as a jurisdictional prerequisite nor designed its own administrative system from which that result could fairly be inferred.[64/] Moreover, unlike state prisoners, who under the 1980 Act will be specifically apprised of available remedies so as to make negligent "waiver" unlikely,[65/] most §1983 plaintiffs

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64/ See Weinberger v. Salfi, supra (exhaustion a jurisdictional prerequisite waivable only by the government); McGee v. United States, supra (inference that Congress barred consideration of claims not presented to agency). See generally K.Davis, Administrative Law Treaties, §20.06 (1958 ed.) and Supps. 1970, 1976, 1980).

65/ See Department of Justice, "Standards for Inmate Grievance Procedures", 46 Fed. Reg. 48187, §40.3, "Communication of Procedures" (Oct. 1, 1981).

will not ordinarily be aware of available remedies. But waiver has been found in analogous situations for reasons of federalism and comity. See Huffman v. Pursue, Ltd., 420 U.S. 592, 611 n.22 (1975). Here too the competing policies are appropriately resolved by Congress to preclude the destruction of §1983 claims Congress has not intended to destroy.

f. Interim Injunctive Relief

The availability of interim injunctive relief has been an important part of §1983 jurisprudence. If exhaustion were required, and an administrative agency was not empowered, or declined, to grant interim relief, would the federal court grant appropriate interim relief and continue a case pending exhaustion? Could it simply assume jurisdiction and proceed to judgment? Would the interim relief factor make exhaustion generally inappropriate in First Amendment cases even if exhaustion could otherwise

be required? These and similar questions could be answered swiftly and surely in legislation, but a case-by-case approach will lead to uncertainty and delays in precisely those cases where certainty and speed are needed.

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The Fifth Circuit has imposed and embarked on the design of an exhaustion scheme of its own making solely by "considering the policy factors" which it believes favor exhaustion, without reference to congressional policy. PA 49a. Its decision to do so was error: the contentions pressed on it are properly "addressed to the political branches of the Government ... and not to the courts." Diamond v. Chakrabarty, 447 U.S. at 317.

## IV. THE ADMINISTRATIVE PROCEDURES AVAILABLE TO PETITIONER ARE PLAINLY INADEQUATE AND DEMONSTRATE WHY EXHAUSTION HAS NOT BEEN REQUIRED UNDER SECTION 1983

The administrative procedures available to petitioner cannot possibly be deemed adequate by any of the standards this Court has articulated in other exhaustion cases. They provide a classic illustration of the reasons why exhaustion of state administrative process has never been required under §1983, and why Congress has refused in civil rights cases generally to deal with exhaustion in any way other than not requiring it, or controlling it under demanding federal standards.

### A. The Available Administrative Remedies

Examination of the administrative procedures available to petitioner at the University level and through the Florida Human Relations Commission demonstrates what Judge Hatchett described as petitioner's "plight"

in pursuing her administrative claim. PA 112a.

The University's grievance procedure, codified in Chapter 6C8-4.05 of the Florida Administrative Code, begins with an informal discussion between the employee and her immediate supervisor. If the problem is not resolved at that level within five days, the employee must submit a formal, written grievance. The grievance is then reviewed again by the employee's immediate supervisor and forwarded to progressively higher levels of the University administration until it reaches the University Vice-President, who has ten days to issue a written determination. Fla. Adm.Code Ch. 6C8-4.05.

If dissatisfied with this determination, the employee may ask the University's Director of Personnel for review by a grievance committee, which must thereupon be appointed within thirty days of the date of the grievance. Ch.6C8-4.05(2)(e)(f). There is no provision for an evidentiary hearing, no

role for counsel and no right of compulsory process to obtain relevant documents or the testimony of favorable witnesses.

The committee has thirty days to complete this review process and to submit a recommendation to the University President, who in turn reviews the committee's recommendations and has fifteen days to provide the employee with a written decision.[66/] The President's decision is the final step in the University's grievance mechanism. Ch.6C8-4.05(2) and (3). No statutory provision we have found would permit him to award damages.

Once the University President has

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66/ If the University is not complying with its own procedures at any stage, the employee may complain to the Florida Director of Personnel in the Department of Administration. That office is limited to requesting official compliance, and has no power to insist on it. Fla.Adm. Code Ch. 22A-15.05(3).

rendered a decision, the employee may either file her complaint, or renew her complaint, with the Human Relations Commission.[67/] The complaint must be filed within 180 days of the event which gave rise to the grievance and the Commission has fifteen days to notify the respondent that a complaint has been filed. The complaint is then set adrift in an administrative process which lacks any deadlines. Fla. Adm. Code Ch. 9D-9.01-.03.

An indefinite period of investigation follows the filing of a complaint with the Commission. The Executive Director of the Commission may begin the investigation through the Office of Field Services, may suspend the investigation for possible resolution at the University level, or may refer

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67/ As a technical matter, petitioner can file her claim initially with the Human Relations Commission but it will generally be referred to the University. Fla.Stat.Ann. §23.167(11); Fla. Adm. Code Ch. 9D-9.03(8).

the investigation to another state or local agency for up to one year. If a referral is made and the referral agency does not resolve the complaint, the Commission may proceed to the next procedural stage or direct the Office of Field Services to conduct further investigation. Ch. 9D-9.02-.05.

Once the Executive Director has determined that an investigation is complete, the investigation results go to the Office of the General Counsel, who determines whether "reasonable cause" exists to believe that an unlawful practice has occurred. If it does, a Notice of Determination is served on the parties, consisting primarily of an invitation to both parties to participate in the next procedural stage, "conciliation" where the Office of Field Services tries to effect a resolution of the unlawful practice. The conciliation process may last up to 30 days and must be completed before the complainant can seek a remedial order.

Ch.9D-9.04-.08.

If the General Counsel makes a finding of no reasonable cause, the complainant may file a "Petition for Redetermination" within 20 days, to be heard before a panel of Commissioners. If the panel finds that "reasonable cause" exists, the complainant is allowed to proceed to the conciliation stage. The panel may also direct that the complaint be returned to the Office of Field Services for even more investigation, or dismiss the complaint. Ch. 9D-9.07-.08.

A complainant may file a Petition for Relief after she has received a finding of reasonable cause and "A Notice of Failure of Conciliation". This entitles her to a full evidentiary hearing, but there is no deadline within which the hearing must be scheduled. Ch.9D-9.08.

The hearing is conducted under the procedures contained in Chapter 9D-8 of the Administrative Code, and results in a recom-

mendation either to dismiss the complaint or to provide relief. The Commission must act upon the recommendations of the hearing officer, but again there is no deadline. Upon a determination that unlawful practices have occurred, the Commission may "order" affirmative relief, but its orders have no binding effect unless the Commission seeks enforcement in a state court, which it is under no obligation to do.[68/] Moreover, if an enforcement petition is filed in state court, the employer-respondent is entitled to trial de novo. Fla.Stat.Ann. §120.69(5). The Commission has no authority to award damages

B. The Available Remedies Are Inadequate

This administrative scheme combines the worst features of several administrative

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68/ Fla.Stat.Ann. §120.69(1)(a). Alterantively, if the HRC finds for petitioner but declines to seek enforcement, petitioner could seek enforcement in the circuit court after waiting 60 more days. Fla. Stat.Ann. §120.69(1)(b). The claim would then be relitigated de novo. §120.69(5).

models which this Court and other federal courts have previously condemned.

1. Effectiveness

In McNeese v. Board of Education, where the Superintendent of Education could enforce his ruling that plaintiff's rights had been violated only by filing a petition in the state courts, this Court held:

> It would be anomalous to conclude that such a remedy forecloses suit in the federal courts when the most it could produce is a state court action that would have no such effect.

373 U.S. at 675. The present scheme is indistinguishable from McNeese in this regard, and finding the procedures available at the Commission to be an effective remedy would require overruling McNeese.[69/]

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69/ The necessity of appealing to the state courts to enforce even a favorable administrative ruling is inconsistent with the holding in Monroe v. Pape, that §1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." The Commission has even less authority than the "inadequate"
(footnote continued on following page)

Apart from their ineffectiveness under McNeese, the Florida procedures are deficient in other respects as well.

First, nowhere in the administrative process -- neither at the University level nor at the HRC -- can petitioner receive the compensatory damages she seeks.[70/]

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(footnote continued from preceding page) administrative body in McNeese, which at least had theoretical power to cut off funds to the erring school district, 373 U.S. at 675-76, and was required to seek enforcement of any violations it found. By contrast, the Commission's power is of an advisory nature which this court has found insufficient even in other contexts to require exhaustion. Frozen Food Express v. United States, 351 U.S. 40 (1956); United States Alkali Export Assn. v. United States, 325 U.S. 196 (1945).

Interestingly, Florida's Title VII deferral procedures have on similar grounds been found so ineffective as to excuse compliance with the exhaustion provisions of 42 U.S.C. §2000e-5(c). See Jones v. Askew, No. 78-111-Civ.-J-WC (M.D. Fla. Dec. 3, 1980).

70/ See Statement of the Case, supra at n.3. Even the Second Circuit, which prior to this case had been the Circuit most hospitable to administrative exhaustion, has recognized that the unavailability of damages is sufficient to render an administrative remedy inadequate. Plano v. Baker, 504 F.2d 595, 599 (2d Cir. 1974). See also Gonzalez v. Shanker, 533 F.2d 832, 838 (2d Cir. 1976).

Second, the available procedures are structurally deficient. The critical questions in this case, as in most discrimination cases, are factual. Yet there is no provision for an evidentiary hearing at the first critical stage of the administrative process - the University level. The consequences of this omission were summarized by the Second Circuit in Plano v. Baker, 504 F.2d 595, 598 (2d Cir. 1974):

> Where a dispute is largely factual, we fail to see how an administrative remedy that expressly forbids the examination of witnesses can be considered adequate for purposes of the exhaustion rule.

Although a hearing is later available at the HRC stage, a complainant has already been forced to expend her time, energy and resources at the University level by the time it is reached.

2. Clarity

As the discussion above indicates, the remedies available to petitioner are

exceptionally convoluted. When petitioner filed her complaint, there were at least two, and possibly three, administrative agencies competing for jurisdiction of her discrimination claim. As already noted, petitioner could have filed a grievance with the University itself or with the Human Relations Commission. Also, the State Division of Personnel provided an avenue of appellate review for discrimination complaints until its governing regulations were changed shortly after this case began.[71/] But regardless of which route she chose, petitioner could only complete her administrative remedy at the Human Relations Commission where even a favorable ruling would not have been enforceable without a state court order.

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71/ The Division of Personnel still promulgates general anti-discrimination guidelines. But its current regulations specify that any claimed violation of those guidelines must be processed through the agency involved (in this case, the University) or the Human Relations Commission. Fla.Adm.Code Ch. 22A-15.05(1).

This "system", as a result, suffers precisely the defect identified by this court in Wilwording v. Swenson, 404 U.S. 249, 250 (1971), quoting from Marino v. Ragen, 332 U.S. 561, 568 (1947):

> The exhaustion-of-state remedies rule should not be stretched to the absurdity of requiring the exhaustion of ... separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find that none of the [alternatives] is appropriate or effective.

3. Speed

Not surprisingly, the complicated nature of these procedures leads to inevitable delays. Even if every stage of the University's appeal mechanism is completed on schedule, it could still take petitioner up to seventy-five days to obtain a final ruling from the University President. Assuming that ruling were negative, petitioner would then have to begin again with the HRC which is under no deadline to issue its

final order. In a case filed almost contemporaneously with petitioner's federal complaint, the HRC took more than a year and a half to issue its final, advisory decision, Hargis v. Leon County School Board, II Florida Administrative Law Reports 957-A(1980), after which state court enforcement would still be required. See PA 114a.[72/] Exhaustion is not required where the administrative process entails excessive and undue delay. See, e.g., Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926)(two year delay); White v. Matthews, 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978)(200 days).

Where Congress has acted in related areas, it has permitted access to federal court far more promptly than the Florida

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72/ If the HRC has not acted in 180 days, a complainant may directly bring a civil suit in state court under the Florida Human Rights Law. Fla. Stat.Ann. §23.167(12).

procedures would permit. See supra at 68-69. While these deadline are not controlling, they provide an ample basis for concluding that the administrative procedures here are inadequate.

4. Futility

Requiring petitioner to exhaust would be requiring her to engage in an obviously futile gesture. Counsel for petitioner met with the acting president of the University and the University's attorney to discuss petitioner's grievance, and petitioner began this §1983 action four months later only after that meeting failed to produce a satisfactory response.[73/] Although the Board have dismissed that meeting as inconsequential and argued that its informal nature cannot compare with the formal grievance mechanism established by the University, the first

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[73/] See Statement of the Case, supra, at 5 n.4.

stage of the grievance mechanism (and the only stage at which binding relief could be had without court order) would have culminated with the University President who had already rejected petitioner's claim. The federal courts have never "'required [litigants] to go through obviously useless motions in order to preserve their rights.'" Bendure v. United States, 554 F.2d 427, 431 (Ct.Cl. 1977)(citation omitted), cert. denied sub nom. Alexander v. United States, 365 U.S. 880 (1961); McNeese v. Board of Education, 373 U.S. at 676; Hillsborough Township v. Cromwell, 326 U.S. 620, 625 (1946); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 35 (1934).

5. Burden of establishing adequacy

The Fifth Circuit did not disagree with the conclusion that the Florida procedures fail to provide a plain, speedy, and effective administrative remedy, but held instead that it could not decide upon the record presented "whether state administra-

tive remedies were adequate in the context of the rights asserted by [petitioner]." PA 55a. By remanding to the district court for an evidentiary hearing, the Fifth Circuit implicitly placed the burden on petitioner to establish the inadequacy of the administrative remedy.

That allocation of the burden of persuasion is inconsistent with McNeese, where this Court declined to remand for further proceedings despite its observation that "it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights." 373 U.S. at 674-75. Instead, the ambiguity of the record was seen in McNeese as a failure of defendant's burden and thus additional justification for the ruling that administrative exhaustion was not required. If this Court had intended to place the burden of proof of adequacy

on petitioner, it could not have reached the decision it did in McNeese.[80/]

For the foregoing reasons, petitioner could not be required to exhaust the remedies available to her even if some §1983 litigants or claims were generally subject to an exhaustion requirement. A case where exhaustion could not in any event be required is plainly an inappropriate occasion for overturning a longstanding rule generally forbidding required exhaustion. The judgment below must be reversed.

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80/ Accord, Morgan v. LaVallee, 526 F.2d 221, 224 (2d Cir. 1975)("Before the court below may relinquish its §1983 jurisdiction it must, on the most narrow reading of the cases, be positively assured -- it may not presume -- that there are speedy, sufficient and readily available administrative remedies remaining open to pursue, an assurance certainly not attainable on this record"); Swan v. Stoneman, 635 F.2d 97, 103 (2d Cir. 1980).

## CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the judgment below be reversed.

Respectfully submitted,

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